

ADMINISTRATIVE APPEAL DECISION

MR. BAHR D. OMIDFAR; FILE NO. 200300721

CHICAGO DISTRICT

MAY 21, 2004

Review Officer: Michael G. Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Mr. Bahr David Omidfar

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Date of Receipt of Request for Appeal: 13 November 2003

Date of Acceptance of Request for Appeal: 22 December 2003

Appeal Teleconference Date: 13 February 2004

Executive Summary: The lack of a written memorandum for the record or other substantial decision document in the administrative record contributes to the lack of understanding of how the Chicago District (District) reached its conclusions. The District's *Jurisdictional Determination Decision Document* functioned as a checklist, broadly detailing the District's conclusion and the materials that were reviewed in making their decision. A decision document must be comprehensive and detail the thought process behind the decision. In addition to providing a list of materials reviewed (i.e. field observations, data, maps) during the decision making process, the District must include a narrative description of how the tools were used to reach a decision. Furthermore, the District made multiple wetland determinations that lacked the documentation required by the 1987 Corps of Engineers Wetland Delineation Manual. Therefore, the appeal has merit in that the administrative record does not support the District's decision and the approved jurisdictional determination (JD) is remanded back to the District for reconsideration using the appropriate tools and sufficient documentation of the decision-making process.

Background Information: In a submittal dated 7 May 2003, Mr. Bahr David Omidfar requested a determination of the Department of the Army's jurisdiction on an approximate half-acre vacant lot at the northwest intersection of Grove Street and Princeton Avenue, Barrington Township, Cook County, Illinois. Mr. Omidfar's stated purpose for purchasing this lot was to build a single-family residence at this location.

Reference materials in the administrative record indicate that a large wetland complex is contained within the subdivision block bordered by Harvard Avenue to the north, Summit Street to the east, Princeton Avenue to the south, and Cook Street to the west. The appellant's property

Programs Support Division
Subject: Omidfar Appeal Decision

is also located within this subdivision block, along the northern side of Princeton Avenue, approximately midway between Summit Street and Cook Street. Based on District statements during the teleconference, a portion of the large wetland complex occurs on the appellant's property. However, the District's approved JD was limited to determining the presence of wetlands and not the extent or location of wetlands on the appellant's property.

On 15 September 2003, the District determined the presence of waters of the United States on Mr. Omidfar's lot and identified a connection from those waters to a navigable waterway. Mr. Omidfar disagreed with the approved JD made by the District. On 7 November 2003, Mr. Omidfar submitted his request for appeal (RFA) of the District's approved JD. On 23 December 2003, Mr. Omidfar's RFA was accepted. The District provided a copy of their administrative record, which was reviewed and considered during the appeal review process. On 13 February 2004 an appeal meeting was held via teleconference. During the teleconference, the District and Mr. Omidfar (appellant) were requested to elaborate on their position in order to clarify the administrative record. This information was also considered as part of the appeal review process.

The District's administrative record contained field notes and photographs recorded on 3 September 2003 during an on-site inspection; copies of resources reviewed by the District (aerial photograph 2001, USGS topographical quad map 1993 and 1923, DuPage and Cook County soil survey 1979, hydrological atlas quad map 1965, National Wetland Inventory map 1981, and local drainage plan); the approved JD letter and the associated Jurisdictional Determination Decision Document dated 15 September 2003.

Appeal Decision and Instructions to the Chicago District Engineer (DE):

Appellant's Stated Reason for Appeal: The Supreme Court decision (SWANCC) and the U.S. Army Corps of Engineers' Regulatory program clearly indicate that the property in question is not in wetlands. The appellant further clarified his reason for appeal by stating that his property is essentially isolated. The appellant explained that his property could not block the flow of water, or be connected to other waters, because it is located in the middle of other homes.

Finding: This appeal reason has merit.

Summary of Decision: The Appellant's Reason for Appeal has merit and the approved JD is remanded back to the District to include sufficient documentation to support its JD and to reconsider its JD as appropriate.

Action: The District's administrative record does not adequately address this issue. The District shall prepare and include in the administrative record a decision document that supports an approved JD. The District shall complete these tasks within 30 days from the date of this decision, and upon completion, provide the division office and appellant with its decision.

Discussion: In the District's approved JD letter to the appellant, the District stated that the appellant's property contains waters of the U.S. The District further asserts that these waters are wetlands and states there is a hydrologic connection between these waters and the Fox River. The District's *Jurisdictional Determination Decision Document* included a Basis of Jurisdictional Determination (BJD). The District cited 33 CFR 328.3(a)(7) as the BJD, stating a presence of wetlands adjacent to interstate or other waters of the U.S., except for those wetlands adjacent to other wetlands. However, the District failed to properly demonstrate how they determined the presence of wetlands and concluded they were adjacent to other waters of the U.S. Thus, because of the unsupportive nature of the JD, there is no way to determine the merit of the appellant's assertion that the wetlands on his property are isolated based on the holding of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 121 S.Ct. 675 (2001). Since that question is not reached, this decision is focused on the relationship of the JD to the District's finding of the presence of wetlands adjacent to interstate or other waters of the U.S.

Wetlands

Use of the 1987 Corps of Engineers Wetland Delineation Manual (1987 Manual) is mandatory to identify and delineate wetlands potentially subject to regulation under Section 404 of the Clean Water Act. In order to identify the presence of wetlands, the 1987 Manual (Part IV, Section D and Part IV, Section D, Subsection 2) requires that adequate information be collected or obtained to complete a routine data form. The District did not include a routine data form (or sufficient information to complete one) in the administrative record. The District did not provide adequate evidence that the site met the three criteria for wetlands; hydrophytic vegetation, hydric soils, and wetland hydrology. Therefore, the District's assertion that the site contained wetlands is unsupported.

Site notes state that "approximately $\frac{3}{4}$ of the property contains wetlands." However, a description of the three wetland criteria is limited to the following statement: "cattail is the dominant vegetative species at the site." The assertion that the site is dominated by cattails is confounded by site photographs included in the administrative record that depict multiple vegetative layers. The presence of trees and shrubs was recorded in photographs taken by the District on site and is also documented by aerial photographs contained within the administrative record. Both appellant and District agreed that the site contained trees during the teleconference and the District further characterized the vegetation as cattails gradually cascading into a forested area. The District then stated that while the vegetative break was gradual, it was easily discernable. When an area contains the presence of multiple vegetative layers and the break between vegetative types is gradual, the 1987 Manual (Part IV, Section D, Subsection 1, Step 4) requires that the soil criteria be considered. If soil maps indicate that the area may contain inclusions of other soil types (e.g. non-hydric), the soil type must be field verified in order to confirm the presence of hydric soils (Part IV, Section D, Subsection 1, Step 5). The District's administrative record contained an undated Lake County Soils Survey Map in which a rectangle was drawn indicating the project area. Based on the project area as depicted on this map, and hand written notes on this map, the project site appears to include soil series labeled as hydric soils and one unlabeled soil series. Therefore, it is unclear if the project area is entirely

comprised of hydric soils and the hydric soil data should be clarified by additional notation in the record or by field verification.

During the teleconference, the District remarked that it had observed wet, muck soils and above ground water levels "at least ankle deep" in the area of cattails. However, these two wetland criteria, wetland hydrology and hydric soils, were never addressed in the administrative record. According to statements made by the District during the appeals teleconference, this data was never collected. The soil survey included in the administrative record indicates that three hydric soil types and one unlabeled soil type are present in the project area. Therefore, it can not be assumed that the location of the observed hydrophytic vegetation (cattails) overlaps the location of hydric soils without further information. Hydric soils can only be assumed when an area has evidence of inundation or saturation, all vegetative layers are dominated by obligate species, and the vegetation break is abrupt (Part IV, Section D, Subsection 1, Step 3). Therefore the assumption that hydric soils exist on site can not be reached because the administrative record documented multiple vegetative layers but did not explain if they were dominated by obligate species; the vegetative break was not reported or described as being abrupt; and the hydrology for the appellant's property was not recorded.

Adjacency

Two factors are considered when determining adjacency: actual proximity of the wetland to the waterway and hydrologic connections between the wetland and waterway. Regulations at 33 CFR 328.5(a)(7) state, "The term adjacent means bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'."

In the approved JD letter, the District asserted jurisdiction over the alleged wetlands on the appellant's property based upon a hydrologic connection between the alleged wetlands on the appellant's property and the Fox River. In the approved JD letter, the District stated that the wetlands flowed through this connection. However, the District failed to document how water flowed from the alleged wetlands on the appellant's property to the culvert on Cook Street in the administrative record. In the Basis for Jurisdictional Determination (BJD) attached to the approved JD letter, the District based its JD on the presence of wetlands adjacent to other waters. However, the District failed to document the proximity of the alleged wetlands on the appellant's property to the culvert on Cook Street. Therefore, the District's assertions that a hydrologic connection exists between the alleged wetlands and other waters of the U.S. and that the alleged wetlands are adjacent to other waters of the U.S. is unsupported.

In the field notes, the District documented how they traced a hydrologic connection commencing from the culvert on Cook Street (an area west of the appellant's property) to the Fox River. In the teleconference the District reported their observations that water was flowing through this hydrologic connection. However, the District failed to include evidence to support these observations in the record. Without a description of hydrologic indicators (e.g. evidence of hydrology, ordinary high water mark), it is an assumption that the culvert, underground pipes and swales currently function, or ever functioned, to convey surface water. During the teleconference, the District further described the system of pipes and culverts as a relocated

water of the U.S. To support this determination, the District referred to the historic topographic gradients and location of hydric soils as depicted in resource maps (hydrology, soil series, and USGS) contained within the administrative record. The District explained in detail how these maps can be used to support their determination that water flowed from the appellant's property and eventually into the Fox River. The record lacks these explanations and a comparison between current site conditions and those conditions depicted by the resource maps. The District never characterized the hydrologic connection between the alleged wetlands and the culvert on Cook Street. Therefore, the District's assertion that there is a hydrologic connection between the alleged wetlands and the Fox River is unsupported.

According to the District's JD letter, the District relied, in part, upon the position of additional wetlands within the landscape to establish the hydrologic connection from the alleged wetlands on the appellant's property to the Fox River. This description relied on "an above ground wetland" and "another wetland system" to complete the hydrologic connection between the alleged wetlands on the appellant's property and the Fox River. As detailed in the previous section, a separate wetland determination must be made (using a routine data form) and included in the administrative record when stating the presence of wetlands. The District did not include a routine data form (or sufficient information to complete one) in the administrative record. In situations where field verification may not be possible (e.g. off-site, private property), the administrative file must contain a description of how the District determined that these areas are waters of the U.S. and function to convey water (e.g. describe the map resources that support the District's conclusion). The District did not provide adequate evidence that the areas identified as "an above ground wetland" and "another wetland system" met the three criteria for wetlands. Therefore, the District's conclusion that relied on wetlands to establish the identified hydrologic connection is unsupported.

Site notes contained in the administrative record document the hydrologic connection as the District "(t)raced a hydrologic connection from the culvert on Cook Street to an underground system of pipes that travel south down Cook Street, then west on Princeton to Barrington Road to a culvert that discharges in Stephanie, Keene and Hawthorne lakes. The lakes flow into Flint Creek that drains into the Fox River, a navigable waterway." This description also relies on Stephanie Lake to establish the hydrologic connection. The location of Stephanie Lake and its connection to Keene Lake is not easily recognized using the map resources contained in the record.

The appellant stated that water cannot flow west from his property to the culvert on Cook Street as indicated by the District. The appellant provided the following reasons to support his claim: the topography of the land increases in elevation as it proceeds from his property in a westerly direction to the culvert on Cook Street; and there are homes and a solid wooden fence immediately adjacent to the west of his property that would prevent water from flowing in a westerly direction. The appellant then stated that water from his property flows south, through a culvert, and into a lot on the south side of Princeton Avenue.

During the appeals teleconference, the District stated that water flowed from the large wetland complex north of the appellant's site to the culvert on Cook Street. The administrative record is unclear if or how the alleged wetlands on the appellant's property are related to the large wetland

complex or how the large wetland complex was considered as the District made its decision. The administrative record lacks a description of the proximity of the alleged wetlands on the appellant's property to the large wetland complex or the culvert on Cook Street; and a description of the topographical or drainage features on site that connect (or as the appellant asserts, divide) the alleged wetlands and the culvert.

A large scale drainage map contained in the record details the storm sewer infrastructure including underground pipes and culverts. This map supports the location of underground pipes and culverts as cited in the District's description. However, in the teleconference, the appellant stated that water from his property actually flows in a southerly direction versus the westerly direction cited by the District. The appellant further stated that the water from his property flows south through a culvert and under Princeton Avenue where it discharges into a lot (labeled as "Lot 1" on the drainage map) on the south side of Princeton Avenue. The drainage map also supports the location of the Princeton Avenue culvert pipe as described by the appellant. Therefore, while the description of the location of underground pipes and culverts may be accurate, the administrative record lacks conclusive evidence to support the assumption that water from the appellant's property flows west and drains into this system.

Overall Conclusion: For the reasons stated above, I conclude that this Request For Appeal has merit. The approved JD is remanded back to the District to include sufficient documentation to support their JD and to reconsider their JD decision as appropriate.

FOR THE COMMANDER:



SUZANNE L. CHUBB
Regulatory Program Manager
Great Lakes and Ohio River Division